No. 11764

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY E. DEAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Basis of Jurisdiction.

A. The District Court had jurisdiction to receive the plea of guilty interposed by appellant and to impose the judgment made and entered herein, under the authority of Title 18, United States Code, Sections 312, 313, 317 and 320, and of Title 28, United States Code, Section 41, Subdivision 2.

B. The indictment contained five counts. Count One charged a violation of Section 320, United States Code, Title 18, in that the appellant, with another, assaulted a railway postal clerk and a mail guard with intent to rob them and steal mail matter then in their custody, and that in attempting to effect such robbery appellant and his co-defendant wilfully put such postal clerk and mail guard in jeopardy of life by the use of a pistol and a sawed-off shotgun. Upon this count, appellant was sentenced to imprisonment for a term of twenty-five years.

Count Two charges a violation of Section 312, United States Code, Title 18, in that the appellant and another defendant wilfully injured certain mail pouches containing registered mail. Counts Three and Four charge the violations of Section 313, United States Code, Title 18, in that the defendant and appellant, and another defendant, did wilfully steal and purloin certain property belonging to the Post Office Department of the United States and in use by said Department. Count Five charged a violation of Section 317, United States Code, Title 18, in that the appellant, and another, did wilfully steal, abstract and remove a certain article of registered mail from a mail bag which was then and there in transmission as mail matter through the Post Office establishment of the United States.

Each of said counts alleged the commission of the offense within the County of Los Angeles, State of California, Southern District of California, Central Division. Such offenses are triable by the United States District Court under authority of the sections of the United States Code, above cited.

Following appellant's plea of guilty he was sentenced to imprisonment for a term of twenty-five years upon Count One, and for concurrent terms of three years upon each of the other four counts. Judgment was pronounced on September 5, 1933. The present appeal is from an order denying a motion to vacate judgment, made by appellant in the District Court June 30, 1947, and denied in that court on August 9, 1947. Jurisdiction of the

District Court to entertain the motion was derived from Rule 35 of Rules of Criminal Procedure.

C. This court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225 (a) and (d).

Statement of the Case.

This is an appeal by Harry E. Dean from an order denying a motion to vacate judgment upon the theory that the judgment imposed upon him was an illegal one within the meaning of Rule 35 of the Federal Rules of Criminal Procedure. On September 5, 1933, appellant entered his plea of guilty to each of the five counts of the indictment herein. The court imposed sentence the same day and appellant is now serving the sentence of imprisonment described in the judgment of the court. On June 30, 1947, appellant filed his motion to vacate judgment in the District Court. The motion was based upon a contention that the judgment was void, for the reason that the court was without jurisdiction to impose any sentence whatever upon appellant for the reason that there were no women on the grand jury venire which returned the indictment to which he pleaded guilty.

Questions Involved in the Appeal.

Appellant states his contention in seven ways. It appears that these are but varying methods of stating his proposition that the judgment is void for the reason that there were no women upon the grand jury which returned the indictment against him. Appellee believes that appellant intended to make his point broader than it is stated,

by complaining that women were systematically excluded from the grand jury which returned the indictment in his case, and as that appears from his brief to be the theory in his appeal appellee states its understanding of the single question involved in the appeal to be—did the court err in denying appellant's motion to vacate the judgment for the reason that the grand jury which returned the indictment against appellant was one from which women were systematically excluded from service?

The Facts.

The motion was heard in the District Court upon the written motion which appears at page 12 of the Record, and upon the Memorandum of Points and Authorities appended thereto. No evidence was taken. It is noted that in the designation of record, appellant designated the following:

> "5. Certificate of the names of the grand jurors which returned the indictment herein, August 23, 1933."

The Clerk has provided that certificate [R. 20]. Although the motion was heard without the introduction of evidence it is conceded by appellee that the trial court took judicial notice of the practice prevailing in the Southern District of California at the time of the return of the indictment herein, with respect to the impanelment of grand jurors. It is further conceded that the grand jury which indicted defendant had been impanelled in substantially the same manner and under substantially the same practice as was employed in the impanelment of the grand jury which indicted the defendants in *Ballard v. United States*, 67 S. Ct. 261, 329 U. S. 187.

ARGUMENT.

Appellant Waived Any Objection to Which He May Have Been Entitled Concerning the Impanelment of the Grand Jury, by His Failure to Present His Challenge in the District Court Prior to the Entry of His Plea of Guilty.

There was no demurrer, motion to quash, or other pleading in the District Court by way of challenge to the form of the indictment or the manner in which it had been obtained or the authority of the grand jury which returned it. Prior to the entry of the plea of guilty there had been a plea of not guilty [R. 9]. The court appointed counsel to represent the two defendants in the case. Plea of not guilty was entered on August 28, 1933, and counsel appointed that day [R. 8]. On September 5, 1933, appellant appeared before the court with his counsel and changed his plea to guilty [R. 10]. The brief record of proceedings in the District Court does not indicate any proceeding other than an original plea of not guilty followed by a change of plea to guilty, without any question of jurisdiction or the authority of the grand jury being presented. Appellant relies upon *Ballard v. United States,* 67 S. Ct. 261, 329 U. S. 187. In that case an attack was made upon the indictment in the District Court. The attack clearly indicated that it was based upon the displeasure of the defendant in that case with having been indicted by a grand jury from which women were systematically excluded.[1]

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[1]In its final opinion (329 U. S. 187), the Supreme Court observed:

> "This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel.
>
> "Both motions were denied and their denial was assigned as error on appeal. *The jury question has been in issue at each*

Appellant further cites *Arthur L. Bell v. United States,* 159 F. (2d) 247 (C. C. A. 9, Feb. 4, 1947). The appellant in that case attacked the indictment in the District Court in much the same manner as was done in the *Ballard* case.[2]

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stage of the proceedings, except the first time that the case was before us. At that time the point was not assigned or argued. But the case was here at the instance of the United States, not at the instance of the present petitioners * * * when we remanded the case for consideration of the remaining issues by the Circuit Court of Appeals, the jury issue was argued. *The Circuit Court of Appeals did not hold that it had been waived.* That Court passed upon the issue, concluding that there was no error in the exclusion of women from the panel, 152 F. 2d 944, and see dissent at page 953. Under these circumstances we cannot say (and the Government does not suggest) that petitioners have lost the right to urge the question here." (Emphasis supplied.)

[2]Prior to the entry of a plea of not guilty, defendants in the *Bell* case filed an instrument in the District Court which they entitled "Plea In Bar." That plea, reported at page 37 of the Transcript of Record in *Bell v. United States,* 159 F. (2d) 247, is as follows:

PLEA IN BAR

Now come the defendants Arthur L. Bell, George Gouverneur Ashwell, Homer G. Wilcox, Bay Burns Sharpe, J. F. Burkey, Max Theodore Miller, Harold Von Norris, William Duerst, Maude Askew, Pauline Kelso, Lawrence Cook, Ed Gilson and Jacob Gloeckler and move this Court to set aside the indictment filed in this case as against these defendants, for the following reasons:

1. That the indictment herein is barred by reason of the fact that the charge against these defendants was presented to and passed upon by an illegal panel of Grand Jurors in that the names of no women had been placed upon said panel and the names of no women were inserted for the drawing of prospective members of said Grand Jury, although in said district and subject to call more than one-half of the persons eligible for grand jury duty were women;

2. That this plea in bar is based upon the affidavit of Jacob Gloeckler hereto attached; and said defendants further request the right to present oral and written evidence thereunder.

Wherefore, these defendants demand judgment herein dismissing the indictment as barred from further prosecution, and

Zap v. United States, 151 F. (2d) 100 (C. C. A. 9, June 4, 1945), 91 L. Ed. 388, 330 U. S. 800, is cited as further authority. The defendant in that case had indicated his dissatisfaction with the grand jury at an early stage of the proceedings.[3]

Appellant, in the case now before the court, is in a position comparable to that of the petitioner in *Redmon v. Squier,* 162 F. (2d) 195 (C. C. A. 9, May 16, 1947)

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> "As far as the Ballard case, *supra,* is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings. The objection should be made seasonably, by motion to quash, or some similar motion."

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further dismissing and discharging those defendants from custody.

The defendant also made a motion to quash indictment, based upon several grounds including the manner in which the grand jury had been drawn. [Transcript of Record, *Bell v. United States,* page 44.]

[3]Defendant Zap, prior to the entry of his plea of not guilty, filed an instrument in the District Court entitled "Plea in Abatement." This attack upon the indictment appears at page 210 of the Transcript of Record in that case, as follows:

PLEA IN ABATEMENT

Comes now the defendant Edward F. Zap and pleads in abatement to the indictment herein returned that the Grand Jury which returned the indictment was composed entirely of men, and that no women were on the panel from which the said Grand Jury was selected, and that the said Grand Jury was not constituted in accordance with the provisions of Title 28, Section 411, United States Codes Annotated.

Wherefore, defendant prays that the case be dismissed and he be discharged from custody.

The record further contained an affidavit setting forth facts in support of the plea. [Transcript of Record, *Zap v. United States,* page 211.]

See, also *King v. United States,* 165 F. (2d) 408 (C. C. A. 8, Jan. 13, 1948). In that case the following appears:

> "[1] Appellant, by motion to vacate judgment, sought to have his sentence and conviction set aside, on the ground that there had been an intentional and systematic exclusion of women (who are eligible for jury service in Arkansas) from the grand jury by which he was indicted and from the petit jury by which he was tried. The trial court denied the motion.
>
> "No objection had previously been made to either the grand jury or the petit jury in the trial court or on the appeal taken to this court from the conviction. King v. United States, 8 Cir., 144 F. 2d 729, certiorari denied 324 U. S. 854, 65 S. Ct. 711, 89 L. Ed. 1413.
>
> "[2] As the Wright case holds, the right to not have women intentionally and systematically excluded from a jury panel is one that may be waived, and it will ordinarily be deemed to have been so waived where timely objection is not made in the proceedings and the question is sought to be raised for the first time by a motion to vacate the judgment."

On the same day that the *King* case was decided, the same court, at 165 F. (2d) 405, decided *Wright v. United States*, which presented the identical question. The following pertinent language is included in that case:

> "* * * Section 556a, Title 18 U. S. C. A., provides as follows: 'No plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the grand jury or upon the ground of disqualification of a grand juror

shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant filing such plea or motion is presented for arraignment; * * *.'

"This statute in form at least limits the power of a court to consider the alleged irregularity in the drawing of the grand jury and when the time limited by the statute has passed the power of the court to entertain an objection to the panel on the ground of the disqualification of the grand jurors is at an end. Medley v. United States, App. D. C., 155 F. 2d 857; United States *ex rel.* McCann v. Thompson, 2 Cir., 144 F. 2d 604, 156 A. L. R. 240. Rule 6(b) (1) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. following section 687, provides that, 'The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.'

"Rule 6(b) (2) provides as follows: 'A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. * * *'

"The manifest purpose of these rules is to require that objections to the array or panel be presented at the early stages of the proceeding. In Carruthers v. Reed, etc., 8 Cir., 102 F. 2d 933, 939, we held that, 'The right to challenge the panel is a right that may be waived and is waived if not seasonably presented.

Such rights, if waived during trial, may not be availed of by attack, in a collateral proceeding.' See also United States *ex rel.* Marshall v. Snyder, 2 Cir., 160 F. 2d 351.

"Defendant relies chiefly on the decisions of the Supreme Court in Ballard v. United States, 329 U. S. 187, 67 S. Ct. 261, and Thiel v. Southern Pacific Co., 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412. In each of these cases, however, the challenge to the panel was timely made and preserved."

Conclusion.

It is respectfully submitted that the District Court was correct in its denial of appellant's motion to vacate judgment, and that the order should be affirmed.

Respectfully submitted,

James M. Carter,
United States Attorney;

Ernest A. Tolin,
Chief Assistant U. S. Attorney,

Attorneys for Appellee.